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Ending Unwarranted Surveillance

THE CONCEPT OF national security surveillance has been distorted and discredited recently, thanks to the plumbers, the Cointel program, illegal mail openings and other operations so offensive to the Bill of Rights. The Church committee's open hearings on Cointel this week should provide more chilling examples of gross abuses of official power. But understanding what went wrong is just the start. The next step is to rehabilitate the concept of national security—not to find new rationales for snooping on domestic dissidents, but rather to define what kinds of surveillance should be permitted, and under what controls, in cases involving foreign agents and intelligence vital to foreign policy and national defense. Those are the areas in which the real interests of national security are found—and in which regulation is most difficult.

One group now wrestling with the subject is a House Judiciary subcommittee chaired by Rep. Robert W. Kastenmeier (D-Wis.). The panel is considering a bill, sponsored by Rep. Charles A. Mosher (R-Ohio) and Sen. Charles McC. Mathias Jr. (R-Md.), which would require federal agents to get search warrants for all electronic surveillance, breaking and entering, mail covers and opening of mail, and inspection of bank, telephone and other commercial records. The warrant requirement could only be waived in cases of hot pursuit, when serving an arrest warrant, or when the subject of the surveillance had given consent. The bill (H.R. 214) would also impose strict rules for record-keeping and reports to Congress, and would make federal agents personally liable for illegal operations.

The principles underlying H.R. 214—clear justification for all surveillance, judicial review and full accountability—are very sound. With a few refinements, the measure would meet the needs of law enforcement while preventing, or at least discouraging, the kinds of unwarranted surveillance that have been so troubling. But as written, the bill would also outlaw, for instance, wiretapping to get defense intelligence, since conventional search warrants cannot be justified for purposes of gathering information rather than investigating crime. The challenge for the subcommittee thus is to devise precise exceptions or separate standards to permit essential national security surveillance to go on—without opening up the way to serious violations of the Fourth Amendment.

The subcommittee could profit from a close reading of Attorney General Edward H. Levi's recent dissertation to the Church committee on the complexities of law and policy in this field. Like Attorneys General since at least 1940, Mr. Levi maintains that warrantless wiretaps and bugging to glean foreign intelligence are not unlawful. His approach is, however, light-years away from the arrogant claims of presidential autonomy made in the Nixon years. Mr. Levi emphasized, for instance, that even in the foreign intelligence field, the executive branch and Congress have the responsibility "to seek an accommodation between the vital public and private interests involved," and to minimize intrusions on individual rights.

The most refreshing aspect of the Attorney General's remarks is his acknowledgement that national security surveillance policies, even in a very narrow field, should not be made by the executive branch alone. Congress should be involved, especially since existing laws do not deal adequately with the sophisticated technology which the National Security Agency, for one, is now using to intercept and analyze telecommunications. Moreover, Mr. Levi seems to be more and more hospitable to some kind of judicial oversight in this area—a check that the executive branch has traditionally opposed. While maintaining that the requirement of a warrant, even with special standards, may not be the best approach, Mr. Levi did note that such a safeguard would "serve the important purpose of assuring the public that searches are not conducted without the approval of a neutral magistrate who could prevent abuses of the technique."

As we have said before, judicial review is vital to insure that all surveillance accords fully with the Constitution and the laws. Federal judges are quite capable of dealing competently—and in confidence—with sophisticated questions of technology and national defense. Of course considerable weight must be given to information and judgments provided by the executive branch; but that makes full accountability to the judiciary and Congress more important, not less. Mr. Levi may not be ready to recommend specific legislation yet, but he has already suggested several avenues for Congress to explore. By approaching the problem with equal seriousness, the Church and Kastenmeier panels can assert real leadership toward ending unwarranted surveillance, and establishing new policies that promote both the precise needs of national security and the broad protections of the Bill of Rights.